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In the Supreme Court of the United States

OCTOBER TERM, 1997

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent contends that the certiorari petition "is based on an erroneous concept of the facts" (Br. in Opp. 5) because "[r]ecently obtained information" (*id.* at 1) indicates that there are errors in the certified transcript of the administrative hearing. This claim comes too late. Respondent never challenged the accuracy of the transcript before the Board of Immigration Appeals (BIA); in fact he filed no brief at all before the BIA (see Pet. 6 n.3). He did file a brief in the court of appeals, but again never challenged the accuracy of the transcript. There is, moreover, no excuse for his failure to do so. Although he may have only "[r]ecently obtained" the tape recording of the administrative hearing, it has been available to him all along.[1]

[1] We have been informed by the Executive Office for Immigration Review (EOIR) that counsel, with the permission of the client, may, at any time, make a request to EOIR under the Freedom of Information Act, 5 U.S.C. 552, to obtain the full record, including copies of the tape recording.

It is clear that respondent's counsel in the court of appeals, (Resp. C.A. Br. 31) both of whom continue to represent him in this Court,

In any event, respondent's reliance on asserted errors in the transcript is without merit. Respondent's central claim is that the transcript states that he stoned civilian bus passengers, but that, in fact, respondent stated that he stoned the buses not the people. See Br. in Opp. 2-3. The tape recording of the hearing does not support that claim. Respondent used a feminine direct object pronoun ("la" translated as "the," see Adm. Rec. 93; see Anthony Gooch & Angel García de Paredes, *Cassell's Spanish-English, English-Spanish Dictionary* 385 (1978)) to refer to the object of his stoning, thus referring back to his use of "la gente" (translated as "the people," Adm. Rec. 93), which is feminine (see *Cassell's*, *supra*, at 332), and not to "el bus" (translated as "the bus," Adm. Rec. 93) which is masculine (see *Cassell's*, *supra*, at 80 (autobus)). If respondent had intended to refer to "el bus," he would have used the masculine direct object pronoun "lo" (see *id.* at 396). Moreover, even under respondent's new factual scenario, "stonethrowing was part of the process of clearing the buses of people" (Br. in Opp. 2), violent conduct that undoubtedly would have terrified the passengers and risked serious injury to them.

None of the other asserted errors respondent discusses is material at this juncture, and none alters the fact that it is undisputed that, on several occasions, over the course of approximately three years (Adm. Rec. 92), respondent hit innocent civilian bus passengers with "palos" (Br. in Opp.

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reviewed the transcript of the hearing. In their brief in the court of appeals, counsel repeatedly cited the hearing transcript (see *id.* at 4-13 (citing it as ROP [record of proceeding] 57-106)), without challenging its accuracy. Indeed, they acknowledged that respondent and the others in the student organization had harmed civilian bus riders and store owners. *Id.* at 26. They attempted to minimize the violent acts by contending that the harm inflicted on innocent civilians "was a result of resistance by people not in agreement with the [student organization's] goals or methods." *Id.* at 24, 26.

3), tied them up with rope (*id.* at 4), broke windows of stores, and ransacked the store owners' merchandise. See Pet. App. 8a-10a. Even if respondent's quibbles with the transcript on several of the particulars were well taken, which they are not,[2] the nature of the weapon used to beat the bus passengers and the method of tying them up does nothing to detract from the fundamental soundness of the BIA's conclusion that there were "serious reasons for considering" that respondent had committed serious non-political crimes in Guatemala. *Id.* at 17a-18a. Although respondent and the other students were purportedly protesting against the government because of the increase in student bus fares and inaction in investigating student deaths, their violent acts were directed not against the government, but against innocent civilians and private property.[3]

2. a. Respondent makes no effort to answer our contention (Pet. 15-16) that the Ninth Circuit erred in holding

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[2] There is no merit to respondent's attempt to minimize the seriousness of the assaults on the civilians by suggesting that the "palos" he used "may refer to a small tree branch" (Br. in Opp. 3-4) or that he tied the people with ropes at the wrists instead of in some other fashion (*id.* at 4). Respondent's new characterization is pure speculation: "palos" generally means sticks or poles (see *Cassell's*, *supra*, at 452); respondent did not use the word for branch ("rama," *id.* at 498); respondent did not even use the word for small sticks ("palitos," *id.* at 452); the verb used by respondent, "golpear," was translated as "hit" but also could be translated to mean "beat, strike, hit, knock, hammer, pound, pummel" (*id.* at 335), which suggests the use of something more than a small branch. And the record simply does not include any description of the method of tying up the civilians.

[3] For the Court's convenience, we are lodging with the Clerk a copy of the tape recording of the administrative hearing which we obtained from EOIR and provided to respondent's counsel. We also are lodging a copy of the certified record of administrative proceedings, filed in the court of appeals, which contains (at 57-106) the certified transcript of the hearing.

that under 8 U.S.C. 1253(h)(2)(C) (1994) and related provisions, the Attorney General must balance the seriousness of the crime she has reason to believe an alien committed against the seriousness of the persecution he might face upon return. The Ninth Circuit's holding finds no support in the text of the statute and is contrary to the Attorney General's longstanding interpretation, which is entitled to deference. See Pet. 13-16.

Moreover, despite respondent's assertions to the contrary (Br. in Opp. 14-15, 19-21), the court of appeals' ruling on this point squarely conflicts with the Eleventh Circuit's decision in *Garcia-Mir* v. *Smith*, 766 F.2d 1478 (1985) (per curiam), cert. denied *sub nom. Marquez-Medina* v. *Meese*, 475 U.S. 1022 (1986). The *Garcia-Mir* court unequivocally held that the aliens in that case were "mistaken" in believing that, with regard to withholding applications, the INS "must balance the degree of persecution which an alien will face if deported against the seriousness of the alien's past criminal activity." 766 F.2d at 1487 n.10. That statement was not dictum. It was the basis for the court's rejection of the aliens' contention that the lower court's decision staying the exclusion orders of even those individuals who would be ineligible for withholding was proper, as well as its holding that "[i]neligible [aliens'] motions to reopen may properly be denied without expenditure of further administrative or judicial resources." *Ibid.* The circuit conflict on that issue warrants resolution by the Court.

Respondent's reliance (Br. in Opp. 20-21) on *Arauz* v. *Rivkind*, 845 F.2d 271 (11th Cir. 1988), to suggest that the Eleventh Circuit addressed the same withholding bar a few years after *Garcia-Mir* and altered its view of that bar is quite misleading. In *Arauz*, the Eleventh Circuit *sustained* the BIA's denial of withholding of deportation based on a different statutory bar, because the alien,

having committed "a particularly serious crime," was a "danger to the community of the United States." See 8 U.S.C. 1253(h)(2)(B) (1994); 8 U.S.C. 1231(b)(3)(B)(ii) (Supp. II 1996). Moreover, the Eleventh Circuit rejected a claim similar to respondent's argument for balancing here, holding that since the alien's "narcotics conviction was in the record, the immigration judge did not have to consider additional information concerning [the alien's] request for withholding of deportation, *because no amount of evidence would have negated the fact of [his] statutory ineligibility for withholding of deportation*." *Arauz*, 845 F.2d at 275 (emphasis added).[4] The language in the opinion quoted by respondent (Br. in Opp. 21) related only to asylum, not to withholding of deportation or a statutory bar to that relief.

b. Respondent likewise makes no effort to answer our argument (Pet. 18-22) that the Ninth Circuit erred in rejecting the Attorney General's interpretation of 8 U.S.C. 1253(h)(2)(C) (1994) in other fundamental respects as well. The Ninth Circuit's recasting of the "serious nonpolitical crime" also warrants review by this Court because it excuses violent acts against innocent civilians and their property that are wholly out of proportion to respondent's

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[4] As we note in the petition (at 17-18 n.6), the court of appeals' holding in the instant case is inconsistent with the recognition in a number of circuits that the other bars to withholding set forth in the neighboring subsections of 8 U.S.C. 1253(h)(2) (1994) (now 8 U.S.C. 1231(b)(3)(B) (Supp. II 1996)) are mandatory and do not require any balancing against the severity of potential persecution. Respondent recognizes that conflict (Br. in Opp. 18-19), but suggests, without any reasoned analysis, that the result should be different under Section 1253(h)(2)(C) than, for example, under Section 1253(h)(2)(B). Resolution of the circuit conflict specifically with respect to Section 1253(h)(2)(C) therefore may clarify the broader issue of the proper standard for the neighboring statutory bars as well.

supposed political disagreement with the Guatemalan government. See Pet. 20-21, 23.

3. As we previously discussed (Pet. 12-14), a high degree of deference is owed to the Attorney General's interpretation and application of the applicable statutory provision under *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Respondent nonetheless contends (Br. in Opp. 7-8) that, because the BIA reversed the ruling of the immigration judge (IJ), the BIA's determination is entitled to reduced deference. The court of appeals opinion relied upon by respondent (*ibid.*) confirms, however, that where, as here, the BIA reversed an IJ's decision in the same case, the "reviewing court is not free to choose between the two interpretations, but must defer to the Board if its decision is supported by substantial evidence." See *Martinez-Benitez* v. *INS*, 956 F.2d 1053, 1055 (11th Cir. 1992).[5] By contrast, when this Court declined to accord heightened deference to an administrative position in *Cardoza-Fonseca*, 480 U.S. at 446 n.30, it was because the BIA itself had taken inconsistent positions in different cases. There is no such inconsistency in BIA decisions here.[6]

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[5] Respondent also errs in contending (Br. in Opp. 7) that the BIA failed to follow its own precedents that call for deference to an IJ's credibility findings. The BIA's decision was not based on any disagreement with the IJ over the credibility of any witnesses. See Resp. C.A. Br. 15 (noting that BIA did not reject IJ's credibility determination).

[6] Neither of the prior BIA decisions cited by respondent (Br. in Opp. 8), involved the statutory bar at issue here. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), involved the question whether an alien had engaged in the persecution of others, which triggers a different bar to asylum and withholding of deportation under 8 U.S.C. 1101(a)(42)(A), 1158(a), 1253(h)(2)(A) (1994), and 8 U.S.C. 1158(b)(2)(A)(i), 1231(b)(3)(B)(i) (Supp. II 1996). *In re Izatula*, 20 I. & N. Dec. 149 (BIA 1990), involved the question, not presented here, whether the alien had shown the requisite likelihood (or fear of) persecution to warrant relief, or whether he instead risked only legitimate prosecution by an internationally-recognized government for crimes he had committed. Neither decision involved the question of balancing a statutory withholding bar against the seriousness of the possible persecution upon return.

Respondent also contends (Br. in Opp. 9-10) that "reduced deference" is appropriate here because, according to respondent, the INS has been inconsistent in interpreting the "serious nonpolitical crimes" bar. But the 1988 INS interpretation quoted by respondent did not relate to the statutory bar to withholding of deportation. Rather, it referred to the elimination of a proposed rule that would have mandated the denial of *asylum*. See 53 Fed. Reg. 11,301-11,302. Indeed, respondent's quotation begins in the middle of a sentence, the beginning of which specified that the statement was made "in the asylum context," and the immediately preceding sentence stated: "The parallel provision contained in § 208.16(c)(2)(iii) with respect to mandatory denials of withholding of deportation will remain intact because it is required by statute." 53 Fed. Reg. at 11,302. Thus, it could not be clearer that the reference to a "discretionary factor" quoted by respondent (Br. in Opp. 9), related to asylum, not to withholding of deportation, and that the Attorney General's interpretation of the withholding bar as mandatory under the INA has been consistent.[7]

4. Respondent's attempts (Br. in Opp. 12-19) to minimize the impact of the court of appeals' decision are without merit. Respondent asserts (*id.* at 14) that all the BIA cases addressing the statutory bar at issue here are

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[7] Respondent's reliance (Br. in Opp. 10-11) on the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Jan. 1988) is misplaced, for the reasons stated in the petition (at 16-17), to which respondent offers no response.

unlike this case because they "concerned asylum *and* withholding," but he does not explain why that matters. In any event, as we explain in the certiorari petition (at 24 n.8), reversal by this Court of the judgment below on the withholding issue would also require reversal of the court of appeals' ruling on asylum, because the sole basis for the court's remand of the asylum issue to the BIA was the court's conclusion that the BIA had erred in its withholding analysis. See Pet. App. 7a.

Moreover, as we also explain in the petition (at 23), the significance of the Ninth Circuit's legal errors will increase in the future because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-691, now extends the same statutory bar to asylum cases. See 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). Respondent is wrong in asserting (Br. in Opp. 15) that IIRIRA has worked no expansion in this regard because it simply "codifie[d] the asylum regulation that had been in place for at least a decade." The first regulation cited by respondent, 8 C.F.R. 208.8(f)(1)(v), was promulgated as an interim regulation in 1980, 45 Fed. Reg. 37,392, but it applied only to decisions by district directors, not to decisions by IJs and the BIA. See 8 C.F.R. 208.8, 208.10 (1981); see also *Arauz* v. *Rivkind*, 845 F.2d at 275-276; *In re Gonzalez*, 19 I & N. Dec. 682 (BIA 1988) (modifying earlier view and holding that IJs and BIA are not bound by 8 C.F.R. 208.8(f)(1) (1988)). The second provision cited by respondent, see 52 Fed. Reg. 32,557 (1987), was a proposed rule that never took effect and that, in any event, would have applied a "serious nonpolitical crime" bar only to decisions by asylum officers. The third provision cited by respondent, 53 Fed. Reg. 11,306 (1988), eliminated the previously proposed "serious nonpolitical crime" bar to asylum. See 8 C.F.R. 208.14 (1998). Thus, prior to

IIRIRA, there was *not* a mandatory bar to asylum in deportation or exclusion proceedings based on reasons to believe that the alien had committed a serious nonpolitical crime.

Respondent similarly errs in suggesting (Br. in Opp. 16-17) that the Ninth Circuit's legal rulings are not significant because the separate bar to asylum or withholding of deportation for aliens who have been convicted of a particularly serious crime[8] will apply to essentially the same pool of aliens who are covered by the statutory provision involved in this case. Unlike the particularly serious crime bar, the provision at issue here does not require proof of a conviction; it requires only "serious reasons for considering" that the alien committed a serious nonpolitical crime outside the United States. 8 U.S.C. 1253(h)(2)(C) (1994); accord 8 U.S.C. 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii) (Supp. II 1996). Moreover, respondent's approach would lead to the anomalous result that those aliens who are successful in avoiding prosecution in the country where they committed a serious nonpolitical crime would be entitled to greater protection than would those who had been prosecuted and punished for their crimes.

5. Contrary to respondent's assertion (Br. in Opp. 21-24), the court of appeals' ruling is not supported by "independent grounds." The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, on which respondent relies (Br. in Opp. 21-22), do not apply because the BIA had taken final action on respondent's application for relief before the

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[8] See 8 U.S.C. 1158(d), 1253(h)(2)(B) and final paragraph (1994); 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i), 1231(b)(3)(B)(ii) and final paragraph (Supp. II 1996). As specified in those provisions, a particularly serious crime includes some or all aggravated felonies, as defined in 8 U.S.C. 1101(a)(43) (1994 & Supp. II 1996).

April 24, 1996, effective date of AEDPA. See Pet. 3-4 n.2. Respondent's criticism (Br. in Opp. 22-23) of the BIA for assertedly glossing over the prong of 8 U.S.C. 1253(h)(2)(C) (1994) that requires the Attorney General to have "serious reasons for considering" that he committed a serious nonpolitical crime is baseless. He did not raise that argument in the court of appeals, and he cites no evidence to contradict his own testimony about his conduct in Guatemala, on which the administrative decision-makers and courts have all relied.

Finally, respondent's reliance (Br. in Opp. 23-24) on the other two legal errors found by the court of appeals does not support a denial of review in this case. To the contrary, as we demonstrate in the certiorari petition (at 18-22), the court of appeals' decision should be reversed in those other respects as well, because the BIA properly concluded that respondent's actions of violence against innocent civilians were wholly disproportionate to his asserted political objectives.

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For the foregoing reasons, and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

JULY 1998